

NAMIBIA AND INTERNATIONAL LAW

Present status of Namibia

To put it in its simplest and starkest terms, Namibia is an international territory unlawfully occupied by South Africa.

According to international law Namibia is under the lawful administration of the United Nations General Assembly, which, for day to day purposes, acts through the UN Council for Namibia. Pending independence, only the UN-- Assembly or Council, as the case may be-- can lawfully carry on the administration of Namibia.

International law goes further: Since Pretoria is an unlawful occupier, similar to the Nazis in Norway or the Netherlands during World War II, it has one duty only: to get out of Namibia immediately. While it remains illegally, it has no right to enact laws, try cases, authorize exploitation of natural resources, represent Namibia in international affairs, levy taxes, or even defend the Territory against attacks by "communist terrorists." (It should be noted that the people Pretoria calls "communist terrorists" are in fact Namibian patriots attempting to drive the illegal occupation forces from their country; the UN General Assembly has approved the use of all means necessary, including armed force, to do this.)

To supplement these positions, the International Court of Justice in 1971 advised the UN Security Council that under international law every UN member has an obligation not to take any action that would in any way recognize South Africa's claim to rule the Territory. Thus countries all over the world may not, inter alia, have any diplomatic representatives in Namibia, enter into treaties with South Africa that affect Namibia, or recognize any action taken by Pretoria on behalf of Namibia (such as representing it at a conference or granting a license to exploit or export Namibian minerals).

Furthermore, UN members may not recognize any local government established by Pretoria as a "Namibian government," since the UN remains the only legal administration until it transfers power to a government established, under international supervision, by the Namibians themselves.

Having set out the law in general terms, I would like to spend the rest of my time discussing how all this came to pass, what role the United States has played, and what are the implications for the future of Namibia.

Namibia through revocation of the mandate

Namibia, originally called South West Africa due to its geographical position, is bounded by Angola and Zambia on the north; Botswana on the east; South Africa on the south; and the

Atlantic on the west. A thin strip of Namibia called the Caprivi Zipfel ("Strip") runs eastward between Angola/Zambia and Botswana to a pinpoint meeting with Zimbabwe. The Territory is as large as Texas and Oklahoma combined and rich in minerals: diamonds, uranium, copper, and many, many others. But it is largely desert and semi-desert, subject to repeated severe droughts, making water its most valuable resource.

Europeans entered the Territory very late in colonial history. In 1878 the British took title to Walvis Bay, Namibia's only deepwater port along its entire coastline; they attached it to their Cape Colony as a sort of colony of a colony. (Subsequently, when the Union-- now the Republic-- of South Africa was formed, Walvis Bay, still attached to the Cape, became part of South Africa.) Six years later the Imperial German Reich took over the rest of the Territory as a "protectorate."

German colonial rule was brutal at best, genocidal at worst. Consequently black Namibians welcomed the "British"-- i.e., South African-- troops that, in 1915, invaded the Territory and occupied it (immediately reuniting it with Walvis Bay) as Pretoria's contribution to the Allied war effort.

South Africa expected to take over "South West" after the War as its traditional booty. However, President Wilson's insistence on a peace without annexations-- an end to the treatment of colonies as a kind of sporting trophy, transferred from winner to winner without regard to the inhabitants-- denied Pretoria its prize. Instead, Namibia became a mandated territory ("mandate") of the newly created League of Nations. It was entrusted to the Union as a "sacred trust of civilisation," to be administered as an "integral portion" of South Africa, but for the benefit of the inhabitants.

South African administration of Namibia turned out to be little different from German rule, and Pretoria was, unfortunately for Namibians, far closer than Berlin. From the outset the Union government treated Namibia as white man's country, and it sought by every possible device to assert sovereignty over the Territory despite League objections.

At the end of World War II the United Nations was created to replace the League, and a somewhat more rigorous Trusteeship System replaced the earlier Mandates System. All mandated territories were given their independence or converted into trust territories-- all, that is, except Namibia.

At the first session of the General Assembly Pretoria, citing phoney consultations with indigenous Namibians, sought UN permission to incorporate the Territory. However, the Assembly refused, urging South Africa, in stead, to bring Namibia under the Trusteeship System. South Africa in turn rejected this advice. Soon Pretoria denied the right of the UN, as successor to the League, to supervise its administration of Namibia. Arguing that with the demise of the League the mandate also died,

Pretoria asserted that it was not accountable to anyone for its actions in the Territory.

Soon after denying the UN's supervisory authority South Africa introduced its full apartheid system in Namibia: It began the official racial classification of all Namibians; replaced customary segregation with mandatory racial discrimination; and divided the entire Territory into exclusive ethnic "bantustans" (or "homelands"). It also began systematic de facto incorporation of the Territory: it gave Namibia representation in the South African Parliament; made all Namibians involuntary citizens of South Africa; and transferred control of black Namibians' communal lands and funds to the South African Bantu Trust, of which the South African State President was the sole trustee.

For 20 years the UN tried every conceivable means to resolve this dispute, from cajolery to concessions to confrontation and back again-- but all in vain. For a UN observer from that period the Reagan administration's emphasis on "constructive engagement" produces a frustrated sense of deja vu. Time and again during the 1950's the General Assembly was persuaded by the American delegates to try understanding and kindness-- with exactly the same results as now: they did not move Pretoria to change, but they did give it time to consolidate its position.

When the UN finally admitted it had exhausted its means of resolving the Namibian issue, Ethiopia and Liberia applied to the World Court under a special provision of the mandate agreement. In effect they asked the Court to find that Pretoria had grossly maladministered the Territory and to fashion an appropriate remedy. After six years of argumentation the Court, in a highly political decision, concluded that the two applicants had no standing to bring the proceeding. Therefore it refused to rule on the complaint.

The international community-- particularly the Africans, who had supported the action with their political and financial capital-- was aghast. A month after the General Assembly opened its next session it responded with drastic and unprecedented action: By a virtually unanimous vote it adopted resolution 2145 (XXI) (1966), which revoked South Africa's mandate and determined that the Assembly would itself administer the Territory until independence.

Half a year later, over objections by the United States and most of Western Europe, the Assembly adopted resolution 2248 (S-U) (1967), which established the Council for Namibia. The Council's primary function was to go to the Territory and administer it until Namibia attained its independence-- a short period in the wishful thinking of many Third World countries.

Once the mandate had been revoked, the legal status of Namibia became that described at the beginning of this paper. No court decision was required to make the UN the sole legal

administrator or to make South Africa's presence, and its every act of administration, illegal. The World Court's ruling in 1971 merely confirmed the logical consequences of the Assembly's action. (In its reasoning the Court determined that the General Assembly did have authority to revoke the mandate and found that apartheid is contrary to the norms of international law.)

The road to resolution 435

As the West had warned-- and perhaps by its warning helped to assure-- resolution 2145 did not result in South Africa's withdrawal from the Territory. On the contrary, the Republic brought in troops to back up its continued rule. (Today its military and paramilitary forces, including Namibians conscripted by law or by economic necessity, are believed to number 100,000 or more-- that is, one soldier for every 15 Namibians, men, women, and children.)

As Pretoria moved to shore up its illegal regime, SWAPO (South West Africa People's Organization), alone among the liberation movements, opted for armed struggle-- in addition to political and diplomatic activity-- to free Namibia. SWAPO has since been recognized by the General Assembly as the "sole and authentic" representative of the Namibian people pending an election to determine their free choice.

The UN meanwhile, thwarted by Pretoria's intransigence, again resorted to negotiation and mediation in an attempt to get South Africa out of Namibia. In 1972 the UN Secretary-General himself went to Namibia to try to find the magic formula.

The first break came in 1974, when a coup in Portugal led to the independence of Angola and Mozambique; hostile black Africa suddenly was at the Republic's borders.

Recognizing the significance of the change, Pretoria, in cahoots with the US, invaded Angola late in 1975 in order to install a pro-South African UNITA government in Luanda. The invasion was turned back by the Angolans, aided by Cuban troops, and South Africa withdrew, deliberately devastating the countryside as it retreated. (It continues that policy today, as do its surrogate UNITA forces, attacking civilians and destroying bridges, clinics, and schools in its raids into Angola.)

The UN response was codified in Security Council resolution 385 (1976) on Namibia. The resolution: (1) called on South Africa to transfer power over Namibia forthwith to the UN; (2) directed Pretoria, pending transfer, to abolish the bantustans, to repeal discriminatory and repressive legislation, and to put into effect other human rights; and (3) provided that, after a period of UN administration, a territory-wide one-person-one-vote election should be held under UN "supervision and control" to elect delegates to a constituent assembly that would draft the constitution under which Namibia would get its independence. The resolution threatened sanctions if South

Africa did not accede within six months.

Under this pressure South Africa assembled a motley group of alleged ethnic "leaders" to consider Namibia's future: "all options are open," it said. However, the deadline expired when the group, meeting at the specially refurbished (and secretly bugged) Turnhalle building in Windhoek, had done little more than express a pious hope for independence soon. For the Western Permanent Members of the Security Council-- Britain, France, and the US-- , however, this was a promising development that should be encouraged! Consequently they jointly vetoed a resolution calling for sanctions against South Africa for non-compliance.

Soon thereafter Secretary of State Kissinger, recognizing that the Turnhalle Conference was not capable of providing a credible formula for a future independent Namibia, formed the so-called "Contact Group." It consisted of the three Western Permanent Members of the Security Council plus the two other Western members then sitting on the Council: Britain, France, and the US plus West Germany and Canada. The Group offered to work out a solution to the "Namibian problem"-- not, be it noted, the "South African problem"-- , and, without any formal approval or authorization, began negotiations with Pretoria to accommodate its concerns. (The members of the Contact Group refused to deal in any way with the Council for Namibia, whose creation they had all opposed, but they did inform SWAPO from time to time of the terms they were working out.)

In April 1978 the Group unveiled a plan (UN document S/12636) for "free and fair elections" in Namibia.

Although said to be "in accordance with" resolution 385, the plan differed in a number of crucial respects: (1) South Africa was not required to immediately transfer power over Namibia to the UN, but was allowed to continue its occupation until the election had been held, the constitution drafted, and the new Namibian government was set to take over; (2) bantustans would not have to be abolished, and only some repressive and discriminatory laws would have to be repealed; and (3) South African officials, along with the hated and feared South African police, would run the election: decide the electoral system, register voters, count the ballots, etc. (While the plan provided that this had to be done to the "satisfaction" of the UN Secretary-General's Special Representative, who would head the UN's monitoring team in Namibia, he was given no power to punish or prevent fraud, intimidation, or other acts that could affect the outcome of the election.)

International lawyers were concerned that these changes could affect the outcome of the election. They also worried about the failure of the plan to mention Walvis Bay: In 1977 Pretoria had detached Walvis Bay from Namibian jurisdiction and attached it to the Cape Province, despite the fact that it was physically and demographically indistinguishable from Namibia and had been administered as a politically indivisible, economically

integrated, and strategically essential part of the Territory since South African troops first occupied the German colony in World War I. By failing to mention Walvis Bay-- and particularly by failing to define the area to which the plan applied as including Walvis-- the Contact Group was taken to have approved, or at least tacitly accepted, Pretoria's unilateral action.

South Africa accepted the plan, and so did SWAPO, which was entirely confident of its popular support.

The plan was then incorporated by reference into resolution 435, adopted in September 1978, which authorized the UN to proceed. When people refer to resolution 435, therefore, they mean the Western plan as supplemented by a report of the Secretary-General (also incorporated by reference) that spelled out the practical arrangements involved in implementing the plan.

Metamorphosis of resolution 435: the US role

Although Pretoria accepted the plan soon after it was unveiled, it is now clear that it did so in the expectation that SWAPO would reject it. When that ploy failed, South Africa raised a series of objections to implementation of the resolution, squeezing first one and then another modification of terms out of the Contact Group-- which often informed the Security Council of the changes but never sought or obtained formal approval or authorization. The Group, indeed, had a Sisyphean task; when one objection was met, another arose, or an older solution became unstuck.

The only barrier to a cease-fire between Pretoria and SWAPO-- which is the necessary first step to implementation of resolution 435-- remains the same today as it was in the fall of 1978: South African intransigence.

Until the advent of the Reagan administration the Contact group held together, negotiating periodically with Pretoria in the (vain) hope of persuading it to finally agree to implementation.

In the last six years, however, American policy towards southern Africa, which goes under the rubric of "constructive engagement," has been directed towards geopolitical and ideological goals, not regional needs or concerns. This change has led to the disintegration of the Contact Group; the US now acts independently in southern Africa.

It is clear that the present administration is not interested in Namibian independence-- except as a photo opportunity for an administration that has had few foreign policy successes. It directs its efforts towards preventing radical change in southern Africa ("promoting regional stability"); ending Russian/Cuban influence there; preserving Western access to its mineral wealth; and protecting the property and interests of whites.

The administration introduced three new, and highly controversial, elements in the Namibian negotiations within its first year:

(1) US representatives presented a "Bill of Rights"-- which was in fact broader in scope than the name implies-- to SWAPO, informing its leaders that they would have to agree to incorporate it in the Namibian constitution as the price for implementation of resolution 435.

It appears that the real purpose of the document was to influence, indirectly when not directly, the government and policies of a future independent Namibia: In addition to its more or less unexceptionable, though sloppily drafted, civic and political rights provisions--it included no economic or social rights--, it contained a provision apparently intended to prevent SWAPO from obtaining outright control of the constituent assembly by requiring that the assembly should decide issues by a 2/3, instead of a simple majority. It also established a very complex one-person-two-votes electoral system, which was designed to dilute SWAPO's majority. (The proposed electoral system aroused such fierce opposition by SWAPO and the Front Line States that the provision was dropped, with South Africa-- not the UN-- empowered to select the electoral system.)

The proposed "Bill of Rights" also contained a number of provisions to preserve white advantages and privileges: Inter alia it effectively prohibited land reform (a basic demand throughout southern Africa) as well as Africanization of the artificially white-dominated civil service.

(2) Somewhat later SWAPO was given an unsigned "non-paper" --i.e., a deniable document-- which purported to be a prescription for ensuring friendly relations between an independent Namibia and its neighbors. Careful perusal of the document, however, revealed that it was a barely disguised draft non-aggression treaty designed to govern relations between Namibia and South Africa after the latter withdrew from the Territory. It appeared to allow the Republic to re-invade the Territory if it disliked political trends there. (Is this the kind of agreement Pretoria is trying to force on Botswana and its other neighbors?) SWAPO has apparently not been pressed to agree to the terms of the document, but, on the other hand, the non-paper has not been withdrawn.

(3) At about the same time the US proposed "linkage," i.e., that the withdrawal of South African troops from Namibia should be linked to the withdrawal of Cuban troops from Angola. One version requires the withdrawal of Cuban troops first; another calls for simultaneous withdrawals. Since that proposal was first made, the US has raised the ante by insisting, in addition, that UNITA share power with the MPLA in the Luanda government.

< While US military support for UNITA's rebellion against the Angolan government is not usually discussed in relation to Namibian independence, it necessarily assures that Cuban troops will not be withdrawn and thus that Namibia will not be freed under the US-revised version of resolution 435.>

Since then the administration has taken no new Namibian initiatives although it has had a hand in negotiating military/political agreements between Pretoria and Angola and between Pretoria and Mozambique, neither of which has been carried out in good faith by the South Africans.

South Africa's "second track": fake independence

Namibia watchers have long known that Pretoria had alternative strategies to win its way in Namibia.

The first, a mixture of delay, prevarication, and intransigence, has so far prevented the UN from bringing Namibia to independence under international supervision and safeguards. But it has not enabled Pretoria to achieve its ultimate goal of ensuring that it can-- preferably at much reduced expense-- dominate Namibia's future as it does its present.

The second track is to grant "independence" to a compliant local "government" that would appear to be legitimate but would in fact be totally dependent on the Republic militarily, technologically, economically, and politically. The pattern has been established in the Transkei and the other "independent states" carved out of South Africa. But the execution would have to be more sophisticated in Namibia.

South Africa tentatively experimented with this approach in 1978 after it refused to implement resolution 435. In December of that year it conducted an election in Namibia, ostensibly to select ethnic "leaders." By fiat of the South African Administrator-General this group was soon converted into a national assembly, and later the assembly got a cabinet. Within a few years, however, that experiment self-destructed. The complicated ethnic structure that had been imposed on the Territory by Pretoria-- in its own and white Namibians' interests-- could not be reconciled with the most modest aspirations for change of the black assembly members.

By 1985 Pretoria was prepared to try again, this time with black front men. They formed the Multi-Party Conference (MPC), an alliance of parties that had taken part in the earlier "government" and some other small groups. On 17 June a proclamation of the South African State President installed 62 selected-- not elected-- members of these groups as a legislative body in a "transitional government" of "national unity."

The cabinet that was created by the same proclamation has gradually been given formal authority over most aspects of government. Although the MPC understands that it is not to

exercise its authority in a manner offensive to Pretoria, it is intended to appear to the outside world to be functioning more and more like the government of a developing country.

The "transitional government" is engaged in drafting a constitution for Namibia. It hopes to finesse the fundamental difficulties that undid its predecessor: to reconcile ethnic (read "white") rights (add "privileges") with enough anti-discrimination provisions to satisfy the constituents of the "government's" black members.

If a compromise constitution can be agreed on, there is a real possibility that South Africa may decide to grant "independence" to the existing "transitional government" under the new constitution. Certainly there have been repeated inspired "leaks" to this effect. And the recent voting record of the Western Powers in the Security Council suggests that, in the absence of some concomitant atrocity, they will not support any effective sanctions to prevent such a move.

The obligations of UN members in such an event are very clear: They will be required not to recognize the new Namibian "government," just as they may not recognize the South African government now when it purports to act for Namibia.

The United States has a long history of not recognizing governments: It refused to recognize the Russian and Chinese communist governments for years; it does not recognize the present Angolan government, and it still refuses to accept the Russian conquest of the Baltic States. Nevertheless, we may expect agitation for recognition of an "independent" Namibian government if it is created, based on: the need to accept political "facts"; ideological interests in opposing "communists" (as Pretoria terms SWAPO) even though SWAPO is not a communist organization and though such action undermines international law; a humanitarian desire to meet the desperate needs of the Namibian people for development assistance, which Washington can provide only on a government-to-government basis (i.e., by recognizing the Windhoek "government"); and the desire for access to Namibia's natural resources.

It will take clear-headed, tough-minded, concerned citizens to persuade our government once and for all that the way to bring real development to the Namibian people is by first assisting them to gain independence in accordance with international law. Then they, and not a South African-controlled "government," will determine their needs for real development.

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